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## DEPARTMENT OF STATE

Washington, D.C. 20520

December 17, 1981

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(With SECRET Attachment)

MEMORANDUM FOR MR. JAMES W. NANCE  
THE WHITE HOUSE

SUBJECT: Proposed Options Memorandum to the President on  
Law of the Sea: Summary of Option II

Attached is a Summary Paper on Implementation of Option II, the option to proceed with negotiations toward a Law of the Sea convention. This paper corresponds to item number 5 of the package transmitted to the NSC on December 14 (reference S/S No. 8136120), and completes formal transmittal of the LOS package to the NSC for consideration.

The attached paper has been cleared by all participating IG agencies except the Department of Interior, which has not completed its review.

The Department of State recommends NSC consideration of the Law of the Sea question at an early date.

L. Paul Bremer, III  
Executive Secretary

Attachment: Summary of Option II Implementation

cc: See Attached Distribution List

State Dept. review completed

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## IMPLEMENTATION OF OPTION II

BACKGROUND

The IG has been considering alternative approaches for meeting U.S. objectives set out in Option II in the Memorandum to the President. This memorandum identifies the major problems and summarizes several possible solutions that would solve practical problems for U.S. seabed mining and mitigate adverse NIEO precedents. The problems in the seabed mining portion of the Draft Convention are significantly interrelated and many cannot be resolved in isolation. In a number of instances, a specific problem could be resolved by obtaining only one of the range of solutions listed. In other instances, it would be necessary to combine two or more of the alternative "fixes" to achieve satisfactory results.

The range of problems and solutions set forth below is not intended to be exhaustive. Equally effective alternative solutions may emerge during the development of instructions and consultations with U.S. allies and others. Through this process, the details of the solutions will be defined, and the most attractive combination or combinations of acceptable solutions will be identified.

I. DECISION-MAKING SYSTEM OF THE INTERNATIONAL SEABED AUTHORITYProblem 1

The Draft Convention establishes a 36 member executive Council which would exercise most powers of the Authority. It is fundamentally important that the U.S. and at least two or three of its principal allies be members. The U.S. is not guaranteed a seat and would be required to compete with its allies for Council membership, while the Eastern European Bloc is guaranteed three seats.

Solutions

- (1) Name the U.S. as a permanent member;
- (2) Reserve seats for the largest investors in seabed mining, the largest consumers of these minerals or the largest contributors to the Authority and Enterprise;
- (3) Reserve seats for the states with the largest GNPs, or those with the largest GNPs who are also large investors;
- (4) Increase U.S. influence over caucuses which select consumer and investor representatives.

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Problem 2

The voting system in the Council does not give the U.S. and its major allies influence commensurate with their interests. The adoption of rules and regulations requires consensus, which gives not only the U.S. but other states a veto. The two-thirds and three-fourths majority voting for other issues gives the U.S. and its allies little blocking power and no affirmative voting power.

Solutions

Ensure that the U.S. can block decisions in concert with two or three of its major allies and can exercise, in concert with a few states of like view, affirmative voting power in rule-making and other key areas through:

(1) Weighted voting (based on production and consumption, financial contributions or similar criteria);

(2) Chambered voting (with veto power in the investor and consumer chambers);

(3) An "inner Council", composed mostly of the U.S. and those states which we believe will most likely vote with us, empowered to decide important questions;

(4) Some combination of the above voting approaches, varying as to the issue involved, but assuring the U.S. and its allies the power to control important decisions.

Problem 3

The all-inclusive, one-nation, one-vote Assembly has broad policy-making powers, is characterized as the "supreme organ" to which other organs are accountable, and is empowered to exercise residual powers of the Authority. Thus, the Assembly could circumvent Council control of the Authority.

Solutions

(1) Subject specific Assembly decisions to weighted or chambered voting that enables the U.S. and its allies to block decisions;

(2) Require Council concurrence with specific Assembly decisions, such as the establishment of policies;

(3) Convert the Assembly into a recommendatory body that meets every two or three years;

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(4) Eliminate the Assembly's supremacy and the Council's accountability to it, while simultaneously expanding the Council's powers;

(5) Restrict the scope of the Assembly's policy-making powers and specify that such policies have no binding force;

(6) Specify that the Council and Seabed Disputes Chamber are independent of the Assembly.

## II. REVIEW CONFERENCE

### Problem

A Review Conference convened 15 years after seabed mining begins would have a broad mandate to amend the Convention. Amendments could be adopted by a two-thirds vote and would enter into force for the U.S. upon ratification or accession by the same majority. If the U.S. opposed the amendments, its only choice would be to denounce the entire Convention.

### Solutions

(1) Condition the entry into force of amendments upon their ratification by all States Parties, all states which have sponsored existing contracts, or all of the major consuming states; (The latter two approaches would be adequate provided that the U.S. was a member of those categories.)

(2) Require Council approval of amendments by consensus (together with a guaranteed U.S. seat);

(3) Require the Review Conference to adopt amendments only on the basis of consensus, concurrence of all sponsoring states, or concurrence of all major consuming states;

(4) Delete the Review Conference provision entirely.

## III. SYSTEM FOR ACQUIRING AND MAINTAINING ACCESS

### Problem 1

The Draft Convention does not assure that qualified U.S. applicants will obtain contracts to mine the deep seabed. A Legal and Technical Commission, that will probably be dominated by developing countries, has the power to grant or deny access on the basis of highly discretionary judgments.

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### Solutions

(1) Assure the U.S. and its allies adequate influence in the composition and decision-making procedures of the Commission;

(2) Include objective qualification standards that eliminate the Commission's discretion to disapprove qualified applicants, impose time-limits on its review of applications, and provide rejected applicants prompt access to commercial arbitration; alternatively, the treaty could set out all of the detailed regulations governing access, together with these procedural protections;

(3) Require the Authority to issue contracts to all applicants and replace the present qualification standards with objective diligence standards to be applied during exploration and development.

### Problem 2

The Authority's powers to regulate seabed mining are inadequately circumscribed. The high risk of politically motivated interference will deter private investment.

### Solutions

(1) Make extensive, technical amendments to remove ambiguity and establish objective criteria for Authority actions;

(2) Rely on U.S. influence in an improved Council and Legal and Technical Commission;

(3) Transfer supervision and enforcement functions from the Authority to states which sponsor contractors;

(4) Specify that the Authority may only impose requirements on contractors which are authorized in rules and regulations, assuming adequate U.S. influence in rule-making;

(5) Specify that the Authority may impose no new requirements on contractors after a contract is issued;

(6) Make all disputes between a contractor and the Authority subject to commercial arbitration.

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Problem 3

By requiring that all seabed mineral development be carried out pursuant to Authority regulations, the Draft Convention enables other states to block the adoption of regulations and, thus, deter the development of minerals other than nodules.

Solutions

- (1) Confine the deep seabed portion of the convention to nodules;
- (2) Grant States Parties the right to develop other minerals in the absence of Authority regulations and provide grandfather rights for such investments after regulations are adopted;
- (3) Obtain adequate affirmative voting strength for the U.S. and its allies in rule-making.

IV. RULES, REGULATIONS AND PROCEDURESProblem

The details of the program for regulating seabed mining will be spelled out in the rules, regulations and procedures of the Authority. While these regulations could be prepared by a Preparatory Commission prior to a decision with respect to U.S. signature or ratification, important issues should be resolved in the treaty itself. Further, the procedure for adopting and amending regulations must adequately protect U.S. interests.

Solutions

- (1) Improve the decision-making system of the Council as indicated above;
- (2) Negotiate establishment of a Preparatory Commission to be made up of states which have signed the final act of the Conference, including a decision-making system patterned after approaches discussed above for the Council, in order to ensure that the rules, regulations and procedures will be available for review before a decision is taken on ratification of the Convention.
- (3) Include in the Convention itself the Authority's initial set of rules, regulations and procedures.

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## V. TECHNOLOGY TRANSFER

### Problem

During an interim period, the Enterprise (the mining arm of the Authority) is empowered to compel seabed mining contractors to sell their technology to it, if the Enterprise finds that it is unable to acquire such technology on the open market on fair and reasonable terms. This right is extended to developing countries under certain circumstances. Moreover, the mandatory transfer obligation is extended indirectly to third party suppliers of such technology. These provisions could have serious precedential consequences. Further, it will be necessary to withhold some technology for national security reasons.

### Solution

- (1) Delete mandatory technology transfer entirely;
- (2) Eliminate mandatory technology transfer for private miners or their suppliers, but empower a Conference or Commission of States Parties to facilitate the transfer of technology to the Enterprise;
- (3) Eliminate mandatory technology transfer, but require State Parties to prevent their companies from colluding to deny the Enterprise access to technology; or allow the Enterprise, upon a showing of such collusion, to obtain technology as part of a commercial arbitration award;
- (4) Eliminate sanctions for invoking national security as grounds for not transferring technology.

## VI. PRODUCTION LIMITATIONS AND RELATED POLICIES

### Problem 1

The production policies contained in the Draft Convention are inconsistent with a free market economic philosophy. These policies include limiting seabed production in order to protect landbased producers against competition from the seabed.

### Solutions

- (1) Recast the production policies to eliminate offending concepts and specify that any Authority role in protecting landbased producers is limited to explicitly identified mechanisms;

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(2) Add new policy goals emphasizing that seabed development should be governed by free market forces;

(3) Add new policy goals which require the Authority at all times to exercise its powers so as permit rather than deter seabed development;

(4) Eliminate the risk that these policies will deter seabed development by other amendments which strengthen the U.S. role in decision-making and reduce the Authority's regulatory discretion.

## Problem 2

The ceiling imposed on seabed production levels could impede seabed minerals development, if the level of production reaches the limit allowed, and in that case may not accommodate the existing consortia interested in seabed mining. Moreover, the procedure for administering this limit enables the Authority to discriminate against bona fide U.S. miners.

## Solutions

(1) Delete the production ceiling entirely;

(2) Delete the ceiling and substitute a prohibition on the subsidization of exports of seabed minerals (or all exports of these minerals, whether produced on land or from the seabed);

(3) Delete the ceiling and substitute a residual power in the Council, pursuant to a highly qualified majority vote, to impose controls upon a finding that developing country landbased producers have been injured by seabed production;

(4) Delete the ceiling and substitute a right on the part of seriously injured developing country landbased producers to exercise a first call on the Authority's funds after Administrative expenses;

(5) Increase the ceiling to ensure that it would have no practical effect.

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## VII. DISCRIMINATION IN FAVOR OF THE ENTERPRISE

### Problem 1

The Draft Convention requires industrialized states to finance the major share of the first mining project of the Enterprise, but grants them little or no control over the terms and conditions of such financing, or over Enterprise operations.

### Solutions

- (1) Specify these terms and conditions in the treaty;
- (2) Assuming adequate U.S. influence in the development of regulations, specify that terms and conditions will be established in such regulations;
- (3) Empower the Council to decide these questions, if the U. S. has adequate influence in the Council;
- (4) Grant major contributors direct control of the Enterprise through guaranteed seats and weighted voting on its Governing Board;
- (5) Require specific Enterprise actions to be approved by the Council, together with adequate U. S. influence on the Council;
- (6) Establish the Enterprise as an autonomous commercial entity, independent of the Authority, and specify a procedure whereby major contributors would run the Enterprise in case of default.

### Problem 2

The Enterprise would enjoy significant discriminatory advantages over other seabed miners and might gain monopoly control over the most attractive seabed deposits after the existing consortia obtain contracts.

### Solutions

- (1) Limit the Authority's right to reserve deposits discovered by private seabed miners for use by the Enterprise;
- (2) Limit the Enterprise's power to compel the sale of seabed mining technology;
- (3) Specify that the Enterprise must comply with the same rules, regulations and procedures as other operators;

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(4) Limit other discriminatory advantages, such as its exemption from penalties, a temporary tax-holiday, and special privileges and immunities.

#### VIII. LIBERATION MOVEMENTS

##### Problem

The Draft Convention provides that "peoples who have not attained full independence or other self-governing status" may share in the economic and financial benefits and exercise rights under the treaty. Furthermore, the final clauses of the treaty have not yet been negotiated to determine what entities other than states may be party to the convention.

##### Solutions

(1) Properly define "people who have not attained full independence or other self-governing status" so as not to include national liberation movements;

(2) Ensure that only states, qualifying regional economic integration organizations, and associated States, may become parties and share in the financial and economic benefits.

#### IX. GRANDFATHER RIGHTS

##### Problem

U. S. seabed mining companies have already spent millions of dollars in preparation of seabed mining, but the Draft Convention does not presently protect the prior investment and equitable interests developed by these companies.

##### Solution

Negotiate a preparatory investment system which will be binding on the Authority and will adequately protect the U.S. seabed mining interest. The details of this solution will depend upon the final provisions of the deep seabed regime.

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